SUPREME COURT, U. S.

FILED

MAR 28 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 964

In the Matter of: THE DANIA CORPORATION

INTER NATIONAL BANK OF MIAMI,
Petitioner,

vs.

J. H. BROCK, Trustee and
THE DANIA CORPORATION, Debtor,
Respondents.

PETITION FOR RE-HEARING

SAM I. SILVER
Counsel for Petitioner
627 S. W. 27th Avenue
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IN THE

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THE DANIA CORPORATION, Debtor,
Respondents.

PETITION FOR RE-HEARING

The Petitioner's Petition for a Writ of Certiorari in the above-entitled case was docketed in this Court on January 21, 1969, October Term, 1968. A copy of the Brief for the Respondents in opposition to the Petition was mailed to Petitioner on February 17 and received on February 19, 1969.

Reply Brief of Petitioner was mailed to the Clerk of the Court on February 27, 1969. Petitioner was notified

on March 3, 1969 by the Clerk of the Court that its Petition for Certiorari had been denied on that date. Petitioner was notified by letter dated March 3, 1969 that the Reply Brief of Petitioner was received too late for presentation to the Court prior to its denial of the Petition for a Writ of Certiorari. Copies of the Certificate of Service of the Reply Brief of Petitioner, dated February 27, 1969, the telegram and letter from the Clerk, both dated March 3, 1969, are attached hereto and made a part of this Petition for Re-Hearing.

Inasmuch as the Reply Brief of Petitioner was filed within a reasonable time following receipt of a copy of the Brief for the Respondents in opposition to the Petition, Petitioner respectfully suggests that a re-hearing be granted herein in order to afford Petitioner the privilege of having the Court consider the contents of its Reply Brief, a copy of which is attached hereto and made a part hereof.

Respectfully submitted,

Sam I. Silver

SAM I. SILVER
Counsel for Petitioner

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1968

No. 964

In the Matter of: THE DANIA CORPORATION

INTER NATIONAL BANK OF MIAMI,
Petitioner,

vs.

J. H. BROCK, Trustee and
THE DANIA CORPORATION, Debtor,
Respondents.

CERTIFICATE OF SERVICE

STATE OF FLORIDA)
: SS.
COUNTY OF DADE)

I, SAM I. SILVER, Counsel for Petitioner, depose and state that on the 27th day of February, 1969, I served by United States Mail, postage prepaid, a copy of the Reply Brief of Petitioner filed herein upon the following addresses:

WAKEFIELD & UNDERWOOD
150 S. E. Second Street
Miami, Florida 33131

SMATHERS & THOMPSON
Alfred I. du Pont Building
Miami, Florida 33131

IRVING M. WOLFF, ESQ.
Attorney for Trustee, J. H. Brock
916 Biscayne Building
Miami, Florida 33130

JOHN H. GUNN, ESQ.
Alfred I. du Pont Building
Miami, Florida 33131

SAM I. SILVER

SWORN TO and subscribed before me
this 27th day of February, 1969.
JUDITH E. BALSHAM
Notary Public, State of Florida at Large
My Commission Expires: 7-7-72

WESTERN UNION
TELEGRAM

GBA 087 1248P EST MAR 3 69 AC 184
A GBA188 (WWNFA025) COLLECT WASHINGTON
DC 3 1212P EST
SAM I SILVER INTER NATIONAL BANK BLDG
625 SW 27 AVE MIAMI FLO(RTE MZ)
PETITION FOR CERTIORARI INTER NATIONAL
BANK AGAINST BROCK DENIED TODAY

JOHN F DAVIS CLERK
(1245)

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON D. C., 20543

March 3, 1969

Received Mar. 5, 1969.
Sam I. Silver, Esquire
627 S. W. 27th Avenue
Miami, Florida 33135

Re: Inter Nat'l Bank of Miami v. Brock, etc., et al., No. 964, O. T. 1968

Dear Sir:

Copies of the petitioner's reply brief in the above-entitled case were received today, too late for presentation to the Court prior to its denial of the petition for a writ of certiorari.

I am returning the copies to you under separate cover.

Very truly yours,

John F. Davis, Clerk

By W. V. GULLICKSON
Assistant

lsr

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 964

In The Matter of:

THE DANIA CORPORATION
INTER NATIONAL BANK OF MIAMI,
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vs.

J. H. BROCK, Trustee and the
DANIA CORPORATION, Debtor,
Respondents.

REPLY BRIEF OF PETITIONER

INTRODUCTION

Petitioner, The Inter National Bank of Miami (hereinafter "Inter National Bank"), submits this Reply Brief in order to demonstrate, through an analysis of the Brief for the Respondents In Opposition, that:

(1) There was no evidentiary basis to support the district court's orders;

(2) The absence of such evidentiary support is graphically illustrated in Respondent's Brief in their effort to support their contentions;

(3) The Respondents have completely failed to meet the issues presented by this cause; and

(4) The authorities cited by Respondents not only lend no support to their position but place in sharp focus the conflict among the authorities which does in fact exist.

THE FACTS

Inter National Bank's petition for a writ of certiorari pointed out that when the district court entered its order approving the sale of the asset in question no finding as to the existence of an emergency was made nor were any facts presented to warrant such a finding. The record demonstrated that the trustee, through his own reports, stated that the asset's value had not been investigated and its market value had *not* been established. Further, assertions by the trustee that accumulating interest and the defense of certain appeals would be costly, expensive and burdensome, and statements by the United States Court of Appeals for the Fifth Circuit that that asset was of questionable market value, which was deteriorating rapidly, and that just cause for the asset's sale, which had become necessary, were without an evidentiary foundation.

With the exception of a reference to the asset's market value, the Court will note that the Respondent's Brief does not controvert Inter National Bank's position that the foregoing matters had no evidentiary support. As to the asset's market value, the Court's attention is directed to page 4 of Respondent's Brief wherein, after discussing the asset's acquisition cost, the following appears:

> "(the fair market value of the stock on the date of the report was far less than the book value maintained on the books and records of the debtor)."

The Court will note that this statement is not accompanied by a reference to the record for the obvious reason that no such reference exists.

The quoted statement exemplifies one of the two major issues in this cause: statements made and actions taken without a factual basis. It vividly portrays the manner in which a debtor's asset with a book value in excess of $4,000,000.00 was disposed of without the trustee's establishing the asset's worth as to either market value, or on a going concern basis as the majority interest in a bank's stock. The "findings of fact" and orders entered pursuant to said "findings" were, in this Court's language, "boiler plate". *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, ___ U.S. ___, 20 L.Ed.2d 1, 15 (hereinafter "*TMT*").

THE CASES

In re Solar Mfg. Corp., 176 F.2d 493 (C.A. 3)

In re Pure Penn Petroleum Co., 188 F.2d 851 (C.A. 2)

Despite the fact that Inter National Bank's petition for a writ of certiorari quite clearly asserted that the opinion of the Fifth Circuit (Petition, App. 1-9) was in direct conflict with *Solar* (Petition, p. 9), Respondents commence the Argument portion of their brief suggesting that the asserted conflict is with *Pure Penn* (Respondent's Brief, p. 11). Notwithstanding this minor inaccuracy, and, as respondents state, that *Pure Penn* involved a Chapter XI arrangement proceeding, Inter National Bank would point out that in *Pure Penn*, the Second Circuit acknowledged *Solar's* holding, in part, that sales pursuant to Section 116(3) of the Bankruptcy Act, 11 U.S.C. §516(3) require "cause shown"—" 'emergencies where there is imminent danger that the assets of the ailing business will be lost if prompt action is not taken.' " *In re Pure Penn Petroleum Co.*, supra at 854. *Pure Penn* was cited not as *the* conflict case but rather, to demonstrate the approval of *Solar* in another circuit.

With reference to *Solar*, Inter National Bank's position is in fact strengthened by respondent's quotation from *Solar* (Respondent's Brief, p. 12) for there, respondents refer to *Solar's* holding which is in direct conflict with the Fifth Circuit's opinion, *viz.*, sales not pursuant to a plan of re-organization are confined to emergency situations.

In re Northern Illinois Development Corp., 324 F.2d 104 (C.A. 7)

Marathon Foundry and Machine Co. v. Schwartz, 228 F.2d 594 (C.A. 7)

In re Gambrinus Brewery Co., 141 F.2d 747 (C.A. 2)

Frank v. Drinc-O-Matic, 136 F.2d 906 (C.A. 2)

It is indeed appropriate that respondents cited the foregoing cases for they serve to place in sharp focus the facts of the present case and *Solar* vis-a-vis the Fifth Circuit's opinion herein (Petition, App. 1-9). Thus, *Northern Illinois* involved a Chapter XI arrangement; recognized that *Pure Penn* found no emergency which constituted "cause" for the sale there in question; and, said the Seventh Circuit, "The requisite emergency is not lacking here. * * * [S]ubsequent events *disclosed by the record* now before us serve only to confirm that observation and to establish that both the potential value of this asset and its purchase at a price reasonably commensurate with its value for its highest and best use *are indeed 'perishable' factors.*" (Emphasis added) 324 F.2d at 107.

In *Marathon Foundry*, an asset (stock) was sold at a price *substantially above* its *appraised value.* The sale provided sufficient funds to pay secured creditors in full with an overage remaining for administrative expenses and general creditors.

In *Gambrinus Brewery*, the "assets were of a *"perishable nature"* and because of the business involved, the "approach of warm weather" placed the assets in jeopardy.

Finally, *Frank v. Drinc-O-Matic* recited few facts other than that the machines in question were to be sold for approximately twice the amount of an existing lien, and the appellate court chose not to substitute its judgment for that of the lower court.

While the cited cases thus distinguish themselves, where in the present record, *substantiated by evidence*, does an emergency appear, where is a perishable, and wherein are we to find an appraisal? The answers to these questions are apparent and the absence of the factors noted in cases relied upon by Respondents again demonstate the need for this Court's review.

Fidelity Assurance Association v. Sims, 318 U.S. 622

Fidelity is a landmark decision. However, because it concerned the requirement that reorganization plans be filed in good faith and the interrelationship between reorganization and liquidation, which points were not raised in the petition filed herein by Inter National Bank, *Fidelity's* citation does not meet the issues presented to this Court.

TMT

A statement in Respondent's brief (p. 14) provides for an area of agreement between the parties to this cause. Thus, Respondents state, "A comparison of the factual situation [in *TMT* and the present case] leaves the instant matter and TMT, *supra, irreconcilable.*" (Emphasis added) The cases are indeed irreconcilable because the

proceedings herein reflect the total failure of the district court to adhere to *TMT*'s standards.

Further, respondent's analysis of TMT fails to grasp the importance of the case. This Court did not render its decision merely because insufficient findings of fact were made and stockholders' interests were not re-evaluated at a particular part of time.

Rather, the *TMT* decision set out the principle, reflected by the quotation from the decision by Respondents (p. 14) that a re-organization court can not shut its eyes to *past, present and future* matters bearing upon the debtor. Further, and with direct application to the present case, *TMT* requires

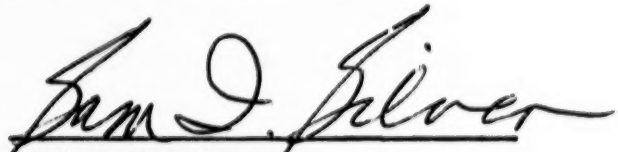
> "well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and [not] mere boiler plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law. * * * To make an informed and independent judgment, however, the court needs facts, not allegations." *TMT*, 20 L.Ed.2d at 15-16.

The order in issue herein surely contains the "appropriate language." It is, however, unsupported by facts —and rests upon aliegations—in that the relevant facts were never presented to the district court. By his own admissions, the trustee neither inquired into and determined the facts (R. 288-89, 346-7, 375) nor, as the record demonstrates, presented evidence of same to the court.

CONCLUSION

Inter National Bank respectfully urges this Court to grant its petition for Writ of Certiorari, review this cause and reverse the decisions below. Respondent's brief demonstrates the necessity for this Court's review.

Respectfully submitted,



SAM I. SILVER
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